Supreme Court, U.S.
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No. 96-1347

In The

Supreme Court of the United States

October Term, 1996

GARY VICKERY,

Petitioner,

v.

JANELL JONES, WILLIAM PEARMAN, KIRK BROWN, WILLIAM ROBERTS and the SALINE COUNTY REPUBLICAN CENTRAL COMMITTEE,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

Table of Contents i

Table of Citations ii

Statement of the Case - Correction of Case Statements in the Petition 1

Summary of Reasons for Denying Petition 4

Reasons for Denying the Petition 5

A. The Party Respondents Engaged in Protected Political Speech 5

B. *Adickes* Does Not Govern the Present Case ... 6

C. There is No Good Basis for the Extension of *Connick* to the Present Case 9

Conclusion 10

TABLE OF CITATIONS

Page

CASES CITED:

Adickes v. S.H. Kress and Company, 398 U.S. 144 (1970) 6, 7, 8

Buckley v. Valeo, 424 U.S. 1 (1976) 6

Colorado Republican Federal Campaign Committee v. Federal Election Commission, 116 S.Ct. 2309 (1996) 6

Connick v. Myers, 461 U.S. 138 (1983) 9

Dennis v. Sparks, 449 U.S. 24 (1980) 7

Eu v. San Francisco County Democratic Central Committee, 489 U.S. 214 (1989) 6

Lugar v. Edmonson Oil Co., Inc., 457 U.S. 922 (1982) 7

N.A.A.C.P. v. Alabama ex rel. Patterson, 357 U.S. 449 (1958) 6

Rutan v. Republican Party, 497 U.S. 62 (1990) 7, 8

United States v. Price, 383 U.S. 787 (1966) 7

Vickery v. Jones, 100 F.3d 1334 (7th Cir. 1996) 4

Vickery v. Jones, 856 F.Supp. 1313 (S.D. Ill. 1994) 6

UNITED STATES CONSTITUTION CITED:

First Amendment to the United States Constitution 2, 4, 5, 6

STATUTES CITED:

42 United States Code 1983 7

TABLE OF CITATIONS – Continued

Page

RULES CITED:

Rule 15 of the Rules of the Supreme Court of the United States 1

Rule 10 of the Rules of the Supreme Court of the United States 10

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Respondents William Roberts and the Saline County Republican Central Committee (hereinafter "Party Respondents") request that the Court deny the Petition for Writ of Certiorari seeking review of an opinion of the United States Court of Appeals for the Seventh Circuit. The Court of Appeals opinion is reported at 100 F.3d 1334 (7th Cir. 1996). For the convenience of the Court, all citations to the opinion of the United States Court of Appeals for the Seventh Circuit will be to the opinion attached as Appendix A to the Petition, all citations to the Memorandum and Order of the District Court will be to the opinion attached as Appendix C to the Petition, and all citations to the Complaint will be to the Second Amended Complaint attached as Appendix D to the Petition. Respondents Janell Jones, William Pearman and Kirk Brown, each employed by the State of Illinois Department of Transportation, are represented by other counsel and are collectively referred to as the "State Officials".

STATEMENT OF THE CASE

Correction of Case Statements in the Petition

The opinion of the Court of Appeals accurately sets forth the facts of this case. The opinion states the Party Respondents " . . . did not hire, promote, transfer or recall anyone . . . " (Op. at A-19). However, to comply with United States Supreme Court Rule 15.2, the Party Respondents bring the following misstatements of fact to the Court's attention.

Petitioner states in his brief, "The Republican County Chairman either selected a person or the name of a person was run by the Republican County Chairman for the Chairman's approval." Petition at 11. Petitioner then urges this Court to grant his Petition by stating: "This Court should grant the Petition in order to determine whether the First Amendment to the United States Constitution protects a political party's participation in a patronage system whereby the party, through its county chairman, selects persons for public employment." Petition at 14. Later, Petitioner revises the constitutional question before this Court as follows: " . . . whether or not the party's *virtual* selection of temporary public employees is protected by the First Amendment to the United States Constitution." Petition at 19 (emphasis supplied). In the instant case the Party Respondents did not select, virtually select, or otherwise hire Gene Bethel, the successful job applicant who was alleged to have been hired by the State Officials in place of Petitioner. Rather, the pleadings filed and evidence elicited at the trial court level indicate quite the opposite.

At the trial court level, the Petitioner pled that the Party Respondents had "approved" or "screened" or "supported" employment applications. (Complaint at par. 22, D-6, 7). The trial court found that the fact allegations were insufficient to state a claim, and did not allege Party Respondents actually hired applicants. The trial court also found that Party Respondents had simply recommended to the State Officials who should be hired. (Op. at C-7, 8).

On appeal to the Seventh Circuit, Petitioner submitted a summary of facts which was significantly watered-

down in comparison to those facts alleged in his Complaint. In his appellate brief, Petitioner failed to mention any specific action on the part of Party Respondents, stating only that State Officials had "admitted taking politics into consideration in filling temporary positions." (Brief of Plaintiff - Appellant Gary Vickery at 8-13). The Appellate Court thereafter found:

> . . . the Party Defendants did not hire, promote, transfer or recall anyone, their screening or recommending the hiring of employees for highway maintenance positions is not the same as being "jointly engaged with State Officials in the prohibited actions." (Op. A-19).
>
> . . . it is not controverted that the Party Defendants had no actual hiring authority and did not make the actual employment decisions. (Op. A-20).

Now Petitioner argues for the first time that the Party Respondents "selected" or arranged for the "virtual selection" of the successful job applicant. The change of terminology from approved, screened or supported to "selected" or "virtual selection" is a thinly veiled attempt to confuse the facts. The trial and appellate courts, upon review of the record, found that the Party Respondents did not hire the successful job applicant, and in fact had no hiring authority. Petitioner is now unable to support an allegation that these Party Respondents hired, selected or virtually selected the successful applicant. The record and discovery in the trial court is entirely unsupportive

of Petitioner's newfound allegations that Party Respondents selected or virtually selected Bethel.[1]

SUMMARY OF REASONS FOR DENYING PETITION

The decision below (*Vickery v. Jones*, 100 F.3d 1334 (7th Cir. 1996)) was in accordance with the body of law that protects political speech and expression pursuant to the First Amendment to the United States Constitution. There is no question of law at issue that justifies the grant of a writ of certiorari. The Seventh Circuit Court of Appeals did not enter a decision in conflict with the decision of another United States Court of Appeals on the same important matter. Furthermore, the Court of Appeals did not decide an important federal question in a way that conflicts with a decision by a state court of last resort. The Seventh Circuit Court of Appeals did not decide an important question of federal law that has not been, but should be, settled by this Court and the Seventh Circuit Court of Appeals has not decided an important federal question in a way that conflicts with relevant decisions of this Court.

[1] Petitioner made no citation to the record to support his allegation that Party Respondents select or virtually select persons for employment in Saline County. Petition at 11, 14, 19. Discovery depositions were conducted at the trial court level which support Party Respondents' view that Petitioner has misstated this fact. In that the transcripts of these depositions are not part of the record on appeal, Party Respondents make only brief and general reference to this sworn discovery testimony.

REASONS FOR DENYING THE PETITION

A. The Party Respondents Engaged in Protected Political Speech

Petitioner seeks to have this case reviewed so that this Court can determine the question of "whether the First Amendment to the United States Constitution protects a political party's participation in a patronage system whereby the party, through its County Chairman, selects persons for public employment". (Petition at 14). Petitioner presents the issue before this Court in a manner inconsistent with the underlying Complaint and the opinion of the Seventh Circuit. Petitioner wants this Court to believe that the issue proffered for consideration is whether the Constitution protects a political party's participation in a patronage system whereby the political party hires or "selects" the person for public employment.

In the underlying Complaint, the Petitioner never alleged that the Party Respondents "select" or "hire" persons for public employment. (Complaint at D-3 - D-7). In fact, in his Complaint, the Petitioner, at paragraphs 22(a) and 22(b), alleges that the State Officials made "decisions regarding employment". (Complaint at D-6). Contrary to alleging that the Party Respondents "selected" or hired persons for public employment, the Petitioner alleges that the State Officials "took advice from" the Party Respondents and that the Party Respondents "screened employees." (Complaint at D-6). The more accurate presentation of the issue before this Court is as follows: "whether the First Amendment to the United States Constitution protects a political party's

participation in a patronage system whereby the party, through its County Chairmen, gives advice to the State Officials who make decisions regarding employment."

The legal principles which govern the decision here are well-established. The First Amendment to the United States Constitution protects political speech and expression. The Party Respondents are entitled to advocate the hiring of a specific person to perform a governmental function. Such recommendations are political expressions for purposes of constitutional protection. *N.A.A.C.P. v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958); *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 116 S.Ct. 2309, 2316 (1996); *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 223-224 (1989); *Buckley v. Valeo*, 424 U.S. 1, 48 (1976).

"The independent expression of a political party's views is "core" First Amendment activity . . . " *Colorado Republican Federal Campaign Committee*, 116 S.Ct. 2309, *citing Eu*, 489 U.S. at 222-23.

B. *Adickes* Does Not Govern the Present Case

Petitioner also wants this Court to grant his Petition for Writ of Certiorari so that the Court can consider whether *Adickes v. S.H. Kress and Company*, 398 U.S. 144 (1970) and its progeny govern this case. As found by the District Court (*Vickery v. Jones*, 856 F.Supp. 1313 (S.D. Ill. 1994)) and the Seventh Circuit Court of Appeals, *Adickes* does not govern the present case. In *Adickes*, the plaintiff was a white school teacher who was refused service in a lunchroom when she was accompanied by six African-

American students, and was then arrested for vagrancy when she left the lunchroom premises. 398 U.S. at 146-47. The plaintiff filed a complaint under 42 U.S.C. § 1983 against both the owner of the lunchroom and the policeman who arrested her, claiming that a conspiracy existed between the two parties. *Adickes*, 398 U.S. 144 (1970). This Court held that:

> Although this is a lawsuit against a private party, not the State or one of its officials, our cases make clear that petitioner will have made out a violation of her Fourteenth Amendment rights and will be entitled to relief under § 1983 if she can prove that a [lunchroom] employee, in the course of employment, and a Hattiesburg policeman *somehow reached an understanding* to deny Miss Adickes service in the [lunchroom], or to cause her subsequent arrest because she was a white person in the company of Negroes. . . . 'Private persons, *jointly engaged with state officials in the prohibited action*, are acting 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a *willful participant in joint activity* with the State or its agents.'

Id. at 152 (citing *United States v. Price*, 383 U.S. 787, 794 (1966)) (emphasis added); *See*, also, *Dennis v. Sparks*, 449 U.S. 24, 27-28 (1980); *Lugar v. Edmonson Oil Co., Inc.*, 457 U.S. 922, 941-942 (1982).

To allege a cause of action under this Court's holding in *Adickes, Dennis* and *Lugar*, Petitioner's Complaint must have alleged that the Party Respondents and the State Officials somehow reached an understanding or conspired not to hire the Petitioner in violation of *Rutan v.*

Republican Party, 497 U.S. 62 (1990). Petitioner fails in his Complaint to adequately allege that there was a meeting of the minds between the State Officials and the Party Respondents or that the Party Respondents had been "willful participant[s] in joint activity with the State or its agents." In the present case, the Party Respondents cannot be parties to an understanding to violate *Rutan* because Petitioner does not allege that they have any hiring authority. The action prohibited by *Rutan* is the hiring, promoting, transferring or recalling of an individual based on his or her political association. *Rutan*, 497 U.S. at 65. The Petitioner fails to allege that the Party Respondents hired, promoted, transferred or recalled anyone. The screening or recommending for hiring of highway workers is not the same as being "jointly engaged with State Officials in the prohibited action." *Adickes*, 398 U.S. at 152.

Petitioner desires this Court to grant certiorari so that it can determine that the Party Respondents were jointly involved with the State Officials in depriving the Petitioner of his First Amendment rights by denying him a job for political reasons. The Petitioner's Complaint does not support this Court granting the Petition for Writ of Certiorari. United States Supreme Court Rule 10 does not support the granting of certiorari for the mere application of legal principles to specific facts. The District and Appellate Courts adequately applied the legal principles set forth in *Adickes* to the allegations in Petitioner's Complaint and found that the Petitioner failed to state a cause of action.

C. There is No Good Basis for the Extension of *Connick* to the Present Case

Petitioner also appears to ask this Court to grant certiorari so that it can explore the extension of the holding in *Connick v. Myers*, 461 U.S. 138 (1983), to individuals other than public employees. In *Connick*, this Court held that in cases alleging the violation of a public employee's free speech rights, the Court must first address the issue of whether the speech in question is of public concern. *Connick*, 461 U.S. at 146. The "public concern test" is intended to balance between the competing interest of public employees' free speech rights, on one hand, and the State's interest, as an employer, in promoting the efficiency of the public services it performs through its employees on the other hand. *Connick*, 461 U.S. at 142. There is no good basis for this Court to consider an extension of the rule set forth in *Connick* to the present case. There is no conflict at issue between circuit courts regarding application of *Connick*, there is no conflict at issue among decisions of state courts of last resort and there is no state or federal Court decision at issue that departed from this Court's decision in *Connick*. Furthermore, the Seventh Circuit Court of Appeals in refusing to extend *Connick* to the present case did not decide an important question of federal law which has not been, but should be, settled by this Court. The Party Respondents are not public employees whose free speech rights need to be balanced against the interests of employers.

CONCLUSION

It is respectfully submitted that Petitioner has wholly failed to sustain its burden of establishing under United State Supreme Court Rule 10 that there are important reasons why the writ should be granted. The decision below did not involve an important question of federal law which has not been but should be settled by this Court nor has the Court of Appeals decided a federal question in a way that conflicts with applicable decisions of this Court or of another Court of Appeals on the same matter. The Court of Appeals correctly held that the Party Respondents are entitled to advocate the hiring of a specific person to perform a governmental function and correctly refused to extend the holding in *Connick* to the facts of this case.

Respectfully submitted,

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